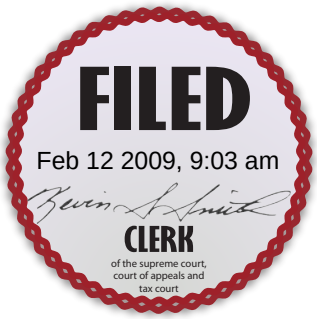

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IN THE
COURT OF APPEALS OF INDIANA

DEVIN GEORGE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0806-CR-330
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0701-MR-13199

February 12, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Devin George ("George") was convicted in Marion Superior Court of murder and Class A misdemeanor carrying a handgun without a license and was sentenced to fifty-five years incarceration. George appeals and presents two issues, which we restate as:

I. Whether the evidence was sufficient to support George's murder conviction; and

II. Whether George's fifty-five year sentence is inappropriate.

We affirm.

Facts and Procedural History

In 2002, Miranda Calvert ("Calvert") became romantically involved with the victim in this case, Keith Bogay ("Bogay"), when they both lived in or near St. Louis, Missouri. When Calvert became pregnant with Bogay's child, Bogay ended the relationship. Calvert then moved to Indianapolis to be closer to her family, but still maintained some contact with Bogay. After her move to Indianapolis, Calvert met Steven Mayberry ("Mayberry"), and the two became romantically involved. Eventually, Mayberry moved in with Calvert at her home in Indianapolis.

In April of 2006, Calvert and Mayberry got into an argument, and Mayberry left Calvert's home and began living with his grandmother. During the time that Mayberry was out of her house, Calvert contacted Bogay in St. Louis. Bogay agreed to come to Indianapolis to spend time with their son and to help Calvert financially. On April 6, 2006, Calvert returned home, where Bogay confronted her because he had found a pregnancy test and suspected that she had been unfaithful to him. Bogay left the house to find and confront Mayberry, and Calvert eventually went out to find Bogay. When she

returned some time later, Bogay was already back at her house. Bogay then attacked Calvert, beating and choking her. When Calvert tried to flee, Bogay pulled her hair and kicked her legs, knocking her down repeatedly. Calvert ultimately made it to her car with her children and telephoned Mayberry for help.

When Mayberry received Calvert's telephone call, he was at his grandmother's house with members of his family and his long-time family friend, defendant George. Mayberry's family and friends could hear Calvert on the telephone and could tell she was upset. Mayberry tried to calm Calvert and agreed to meet her at a nearby gas station. Mayberry asked his mother, Celeste Cobb ("Cobb") to drive him to the gas station. Cobb agreed, and borrowed her mother's car to drive Mayberry to meet Calvert. George got into the car and said, "I'm going too." Tr. p. 340.

Calvert had driven to the gas station, where she parked and waited for Mayberry to arrive. Also at the gas station were two police officers. Indianapolis Police Department Officer Michael Bruin noticed that Calvert's car had an out-of-state license plate and had been sitting idling for a while. He therefore decided to drive up next to her car and ask her if anything was wrong. Calvert indicated that she was fine and that she was waiting for a friend, i.e. Mayberry, indicating to a car that had entered the gas station lot. The two cars then left to return to Calvert's home.

While Calvert and Cobb remained outside, Mayberry and George went into Calvert's house, where they found Bogay in a bedroom.[1] Mayberry and George began to

[1] Mayberry testified that he found Bogay naked in the bedroom. The State's theory, however, was that Mayberry and George forced Bogay to undress.

fight Bogay, whom they struck repeatedly in the head. The fight eventually spilled outside onto the front porch. Once outside, Bogay fell to the ground unconscious. Mayberry kicked Bogay while he was on the ground. When a glass of water was thrown in Bogay's face in an attempt to revive him, Bogay choked and coughed up blood. Cobb told Mayberry and George to leave, and she and Mayberry went to her car. Bogay got up and stumbled down the street, and George followed him. Mayberry and Cobb then heard two gunshots. Mayberry looked up and saw George with a gun in his hand. George came back to the car but told Cobb, "I didn't shoot him." Tr. p. 440. Cobb drove Mayberry and George to the White River, where George got out of the car and disposed of the gun. Cobb then drove back to her mother's house.

At the house, Mayberry and George washed their hands. Calvert later noticed that the two were behaving oddly. When George began to tell her what had happened, Mayberry told him to be quiet. George later bragged about his shooting, using offensive language. Mayberry's grandmother overheard George say, "I got that n***er, I got him, I shot him in the balls, didn't I?" Tr. p. 402. George's own second cousin heard him say, "I think I killed the n***er." Tr. 228. One of Mayberry's cousins also heard George say, "I shot that n***er." Tr. p. 240. George also told Calvert to say that "he wasn't there," and reminded her that "[she] had children to think about," which Calvert took as a threat. Tr. p. 290.

Back at the scene of the crime, a neighbor had heard the gunshots and called the police. The police arrived and found Bogay lying naked on the side of the street. While Bogay was transported to the hospital, the police "canvassed" the neighborhood and saw

blood on the porch and front door of Calvert's house. Concerned that there could be another victim inside, the police forced their way into the house and found a blood trail leading up the stairs and to a bedroom which contained blood and bloody clothes. Officer Bruin, who was one of the responding officers, noticed a picture of Calvert on the wall and recognized her from their encounter at the gas station. He gave the other officers the information he had obtained earlier from Calvert's car. Eventually, the police tracked Calvert and Mayberry down and interviewed them. Initially, neither Calvert nor Mayberry implicated George. However, shortly after they were arrested, Calvert and Mayberry told the police what had happened, including George's involvement.

On April 9, 2006, Bogay was declared dead. The injuries to his face were so severe that the investigators initially thought he had been shot in the face. As a result of the injuries to his head, Bogay's brain swelled and caused irreversible brain damage. Bogay also suffered two gunshot wounds. One gunshot wound was in his abdomen and caused several injuries to his large and small intestines and to a main artery and vein. This caused "a tremendous amount of blood loss." Tr. p. 490. The other gunshot wound was in Bogay's left hip. The bullet causing this wound lodged in the third lumbar vertebra. The angle of this wound indicated that it had been fired while Bogay was lying on the ground. Both the injuries to Bogay's head and the gunshot wounds were severe enough to have independently caused Bogay's death.

Mayberry was ultimately charged with murder and later convicted of the lesser-included offense of Class A felony voluntary manslaughter. See Mayberry v. State, No. 49A05-0708-CR-487 (Ind. Ct. App. June 5, 2008), trans. denied. On January 24, 2007,

the State charged George with murder and Class A misdemeanor carrying a handgun without a license. A jury trial was held on April 28 – 30, 2008, at the conclusion of which the jury found George guilty as charged. On May 7, 2008, the trial court held a sentencing hearing. After concluding that the aggravating factors and mitigating factors were in balance, the trial court sentenced George to the advisory term of fifty-five years for the murder conviction and to a concurrent one-year term for the misdemeanor conviction. George now appeals.

I. Sufficiency of the Evidence

George first challenges the sufficiency of the evidence supporting his murder conviction. Upon review of claims of insufficient evidence, this court will neither reweigh the evidence nor assess the credibility of the witnesses. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008). We instead consider only the evidence most favorable to the verdict and reasonable inferences to be drawn therefrom. Id. If there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt, we will affirm the conviction. Id.

Essentially, George claims that, as State's witnesses, Mayberry and Calvert cannot be believed because they had a reason to implicate him and lessen their own culpability. He emphasizes that when Calvert and Mayberry were initially questioned by the police, they did not implicate him. In other words, George requests that we judge the credibility of witnesses and reweigh the evidence, which we will not do. See id. Moreover, the testimony of an accomplice standing alone is sufficient to sustain a conviction for murder. Brown v. State, 529 N.E.2d 328, 330 (Ind. 1988). And, here, there was more

evidence than simply an accomplice's testimony. Thus, George's attacks on the credibility of the witnesses must fail.

George also claims that the testimony contained contradictions and inconsistencies. However, the only specific evidence he refers to is Mayberry's testimony that he and George found Bogay naked in the bedroom, whereas the State's theory was that Bogay was forced to undress. This relatively minor inconsistency does not mean, however, that the remainder of the evidence was insufficient to establish that George beat and shot Bogay.

George also argues that the testimony given by the State's witnesses was "incredibly dubious." We will overturn a conviction based upon the "incredible dubiosity" rule when the testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. Baumgartner, 891 N.E.2d at 1138. However, application of the "incredible dubiosity" rule is limited to those situations where a *sole* witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. Id. Here, the incredible dubiosity rule is inapplicable because multiple witnesses testified regarding George's role in Bogay's death and also because there was circumstantial evidence of George's guilt. Moreover, there is nothing in the testimony of the State's witnesses which is so inherently improbable that it runs counter to human experience and no reasonable person could believe it. Any bias or inconsistency in their testimony was for the jury to consider, and we will not disturb their verdict.

As noted in the facts set forth above, there was evidence that George went with Mayberry to Calvert's home where he and Mayberry severely beat Bogay, leaving him lying unconscious and naked on the ground. George then shot Bogay twice. The evidence established that either the beating or the shooting were independently sufficient to cause Bogay's death. From this, the jury could reasonably conclude that George knowingly or intentionally killed another human being. See Ind. Code § 35-42-1-1 (2004) (defining crime of murder). In short, the evidence is sufficient to support George's murder conviction. See Brown, 529 N.E.2d at 330 (evidence sufficient to support murder conviction based in part on testimony of accomplice who testified pursuant to plea agreement).

II. Sentencing

George next claims that the trial court erred when it imposed the advisory fifty-five year sentence for his conviction for murder. Although George frames his argument as a claim that the trial court's sentence was inappropriate, George also argues that the trial court erred in overlooking certain alleged mitigating circumstances. A trial court may abuse its sentencing discretion by issuing a sentencing statement that omits mitigators which were both clearly supported by the record and advanced for consideration. See Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

George specifically claims that the trial court should have found that the victim in this case, Bogay, provoked him by attacking Calvert. See Ind. Code § 35-38-1-7.1(b)(5) (Supp. 2008) (listing as permissible mitigating factor that the defendant "acted under

strong provocation"). We note, however, that although Bogay may have attacked Calvert, he did nothing to George personally. Moreover, Bogay's attack on Calvert was not done in George's presence nor immediately prior to George's beating and shooting of Bogay. Instead, George actively participated in an act of revenge which ultimately resulted in Bogay's death. Under these facts and circumstances, we cannot say that the record clearly supported a finding that George was strongly provoked by the victim.[2]

George next claims that we should consider that he had a difficult childhood. However, he does not explain why his difficult childhood led to his current behavior or somehow lessens his culpability. See Hines v. State, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006), trans. denied; see also Loveless v. State, 642 N.E.2d 974, 976-77 (Ind. 1994) (trial court was under no obligation to consider as mitigating defendant's "overwhelmingly difficult" childhood where there was no indication of how the defendant's admittedly painful childhood was relevant to her level of culpability).

George also briefly argues that the trial court should have considered that he is mentally impaired. The only direct evidence of this, however, was the brief testimony from George's mother that her son had a "learning disability." Tr. p. 656. We cannot say that this alleged mitigator was clearly supported in the record based simply upon George's poor performance in school and the testimony of his mother, which the trial

[2] George also claims that the trial court improperly gave too much aggravating weight to his criminal history. We first note that the trial court specifically recognized that George's criminal history was not "the worst I've seen[.]" Tr. p. 666. More importantly, however, under the post-Blakely amendments to our sentencing statutes, a trial court can no longer be said to have abused its discretion by improperly weighing or balancing the aggravating and mitigating circumstances. Anglemyer, 868 N.E.2d at 491.

court was under no obligation to credit. Moreover George does not explain how his alleged learning disability lessens his responsibility for his current criminal behavior.

George's main argument regarding his advisory fifty-five year sentence is that it is inappropriate given the nature of the offense and the character of the offender. Pursuant to Indiana Appellate Rule 7(B), this court possesses the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we conclude that the sentence is inappropriate in light of the nature of the offense and character of the offender. Although Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

It is the defendant's burden to persuade us that his sentence is inappropriate. Anglemyer, 868 N.E.2d at 494. The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. Id. at 494. Therefore, when the trial court imposes the advisory sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), trans. denied; Golden v. State, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), trans. denied.

With George's heavy burden in mind, we first look to the nature of the offense. George admits that circumstances of the crime were "unquestionably brutal." Appellant's Br. p. 25. George, however, attempts to minimize his involvement in the crime, claiming, "[a]ssuming [he] was involved at all, the extent of his involvement

cannot be ascertained from the record." Id. To the contrary, there was sufficient evidence to establish that George voluntarily got in the car with Mayberry, helped him attack and brutally beat Bogay, and shot Bogay twice, once while Bogay lay helpless on the ground. George then bragged, in a particularly offensive manner, about shooting Bogay.

George further argues that he was not the instigator of the crime, laying blame at the feet of Calvert, Mayberry, and even the victim, Bogay. Although George may have not started the chain of events which led to Bogay's death, he was certainly an active participant. We do not deny that Bogay's attack on Calvert was criminal, but it did not justify Mayberry and George's savage beating of Bogay, much less George's senseless act of shooting Bogay.

Turning to the character of the offender, we note that George has a criminal history that is not insubstantial. As a juvenile, George had a true finding for criminal conversion, and subsequently violated the conditions of his juvenile probation for being in possession of a knife while on school property. He later violated the terms of a suspended commitment by committing the offense of escape. George also had two juvenile adjudications for public intoxication, one for possession of marijuana, and another for the above-mentioned escape, which would have been a C felony if committed by an adult.

George also has an adult criminal history that includes a conviction for Class D felony possession of cocaine or narcotic drug. The probation he received in that case was later revoked.

Suffice it to say that George has not led a law-abiding life prior to his current convictions. His criminal history also undercuts his argument that he has a strong potential for rehabilitation. George's juvenile and adult criminal history instead show his repeated disregard for the law.

George's references to his "positive character traits" are simply a request that we look at the evidence in the light most favorable to him. Even then, his claims that he is "kind, caring, and loving," id. at 33, are belied by the brutal and senseless nature of the crime he committed. In short, given the nature of the offense and the character of the offender, the trial court would have been justified in imposing a longer sentence than it imposed. Therefore, the advisory sentence imposed by the trial court was certainly not inappropriate.

Conclusion

The evidence favorable to the jury's verdict is sufficient to support George's conviction for murder. George's claims to the contrary are simply a request that we assess the credibility of the witnesses and reweigh the evidence, which we will not do. And given the brutal nature of the murder and the evidence of George's character, we cannot say that the advisory sentence imposed by the trial court is inappropriate.

Affirmed.

BAILEY, J., and BARNES, J., concur.